

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DARNEY RAY WHITE,)	No. CV-F-05-946 REC
)	(No. CR-F-03-5308 REC)
)	
Petitioner,)	ORDER GRANTING PETITIONER'S
)	MOTION TO RECALL MOTION TO
vs.)	WITHDRAW SECTION 2255 MOTION
)	(Doc. 38), DENYING SECTION
)	2255 MOTION (Docs. 29, 33 &
UNITED STATES OF AMERICA,)	34), AND DIRECTING ENTRY OF
)	JUDGMENT FOR RESPONDENT
)	
Respondent.)	
)	
)	

On July 25, 2005, petitioner timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.¹ On August 22, 2005, petitioner filed an Amended

¹Petitioner filed a motion for recall of sentence or modification of sentence on March 25, 2005. By Order filed on April 7, 2005, the court deemed this motion to be a motion for relief pursuant to Section 2255 and denied the deemed Section 2255 motion. When petitioner filed the instant Section 2255 motion, the court, by Order filed on August 4, 2005, accepted jurisdiction of the Section 2255 motion because the court had neglected to follow the procedure mandated by United States v. Seesing, 234 F.3d 456 (9th Cir. 2000) when it deemed the motion for recall of sentence or modification of sentence to be a Section 2255 motion.

1 Supplemental Basis for relief under Section 2255. The court
2 ordered the United States to respond to the Section 2255 motion
3 and the Amended Supplemental Basis for Relief. On October 13,
4 2005, petitioner filed a motion to withdraw the Section 2255
5 motions, which motion was granted by Order filed on October 19,
6 2005. Thereafter, the United States filed its response to the
7 Section 2255 motions. On October 21, 2005, petitioner filed a
8 motion to recall the motion to withdraw the Section 2255 motions.

9 A. Motion to Recall Motion to Withdraw Section 2255
10 Motions.

11 On October 13, 2005, petitioner Darney Ray White filed a
12 motion to withdraw the Section 2255 motion filed by him on July
13 25, 2005 as amended on August 22, 2005 "in the interest of
14 justice." By Order filed on October 19, 2005, the court granted
15 petitioner's motion to withdraw, dismissed the Section 2255
16 motion, and directed entry of judgment for respondent.

17 On October 21, 2005, petitioner filed a motion to recall his
18 motion to withdraw the Section 2255 motion. In his motion to
19 recall his motion to withdraw the Section 2255 motion, petitioner
20 asserts that he filed te motion to withdraw "under duress"
21 because Assistant United States Attorney Rice "sent me threats
22 via Ann Voris" and that AUSA Rice "requested Ann Voris, relay to
23 me that, if I don't withdraw my 2255 ... I would be returned to
24 court to be resentenced as a career criminal." Attached to
25 petitioner's motion to recall his motion to withdraw is a copy of
26 a letter dated September 20, 2005 from AUSA Rice to Assistant

1 Federal Defender Ann Voris, who represented petitioner in the
2 underlying criminal action. AUSA Rice's letter states:

3 Greetings. Enclosed is a 2255 motion filed
4 by your client, Mr. White, in breach of the
5 plea agreement provision waiving his right to
6 file a 2255 motion. Basically, he asserts
7 that you misled him while he was on
8 medication in order to get him to plead
9 guilty. His assertion is obviously false
10 based on the plea colloquy and having known
11 you for many years, but the Court has
12 nonetheless ordered the government to respond
13 by October 11, 2005.

14 Interestingly, in looking at Mr. White's
15 criminal history again and after doing some
16 legal research, it appears that he should
17 have been sentenced as a Career Offender
18 under U.S.S.G. § 4B1.2. He has a 1988 HS
19 11366 felony conviction for maintaining a
20 place for drug sales in San Diego County
21 Superior Court #93564, a 1993 PC 487.2 felony
22 conviction for grand theft person in San
23 Diego County Superior Court #133569, and a
24 2001 PC 243 conviction for felony battery on
25 a peace officer in Monterey County Superior
26 Court # SS001497A. See Commentary to § 4B1.2
Application Note 1 - maintaining any place
for purpose of facilitating a drug
trafficking offense is a controlled substance
offense; United States v. Robinson, 967 F.2d
287, 293-94 (9th Cir.1992) (battery on a peace
officer is a crime of violence); United
States v. Wofford, 1997 WL 226195 (9th Cir.,
May 7, 1997) (grand theft person is a crime of
violence). His advisory guideline range
should have been, even after reduction for
acceptance of responsibility, 151-188 months.
He was sentenced to 77 months.

27 I have not yet decided whether to oppose his
28 2255 motion, or take advantage of his breach
29 of the plea agreement and seek resentencing
30 under the Career Offender guideline section.
31 In any event, as a courtesy, I thought I
32 would alert you to the situation, so that if
33 you wish you can discuss the situation with
34 Mr. White.

1 Please let me know at your earliest
2 convenience whether Mr. White intends to
3 proceed with his 2255 motion or withdraw it,
or if you decide not to talk to him, so that
I can make a decision and advise the Court.

4 Also attached to petitioner's motion to recall the motion to
5 withdraw is a copy of a letter dated September 22, 2005 from Ms.
6 Voris to petitioner, in which Ms. Voris states:

7 Enclosed is a copy of correspondence received
8 by this office from the Assistant United
9 States Attorney regarding the § 2255 motion
which you filed with the court. A copy of
your motion is also attached to his letter.

10 Please review Mr. Rice's letter carefully and
11 call me as soon as possible so that we may
12 discuss how you wish to proceed and how best
to protect your interests. You may call this
office collect.

13 Nothing in these letters substantiates petitioner's
14 contentions that he moved to withdraw his Section 2255 motion
15 because of duress or that these letters demonstrate collusion
16 between AUSA Rice and Assistant Federal Defender Voris. AUSA
17 Rice was advising Ms. Voris, as petitioner's defense in the
18 underlying criminal proceeding, of his positions concerning the
19 Section 2255 motion and the possible consequence to petitioner if
20 his Section 2255 motion were granted. Ms. Voris properly
21 transmitted Mr. Rice's letter to petitioner and requested that he
22 communicate with Ms. Voris concerning Mr. Rice's letter. There
23 is nothing inappropriate, unprofessional or collusive in these
24 events. Therefore, to the extent that petitioner seeks to set
25 aside the motion to withdraw his Section 2255 motion and the
26 court's Order granting that motion on these grounds, the court

1 rules that petitioner's contentions are without merit.

2 Nonetheless, because the briefing on petitioner's Section
3 2255 motion is complete and in the interest of justice, the court
4 will grant petitioner's motion to recall his motion to withdraw
5 the Section 2255 motion and vacate the Order granting the motion
6 to withdraw the Section 2255 motion, thereby considering the
7 merits of the claims asserted in the Section 2255 motion filed by
8 him on July 25, 2005 as amended on August 22, 2005.

9 B. Motions to Vacate, Set Aside or Correct Sentence.

10 In the Section 2255 motion filed on July 25, 2005,
11 petitioner raises three grounds for relief.

12 As Ground One, petitioner asserts that the plea agreement is
13 "inadmissible" because it was misrepresented to petitioner by
14 defense counsel. Petitioner contends:

15 Defendant was on psychiatric meds at the time
16 he signed to plea agreement. Defendant's
17 attorney told defendant that she would remove
18 him giving up his right to appeal, and did
19 not inform him that he would be giving up his
20 right to challenge any part of his
21 conviction. Defendant also was not cleared
22 by a psychiatric doctor, that he was making a
23 sane decision. The court did not inform
24 defendant that they had to consider
25 guidelines, but may depart from them under
26 some circumstances by law. And those
circumstances apply to this defendant.

22 As Ground Two, petitioner asserts that he "was not cleared
23 as competent by a doctor". Petitioner contends:

24 At one point in the case, the court
25 considered sending defendant to mental
26 hospital for evaluation, due to his privious
[sic] mental, and present, mental conditions.
Defendant was not cleared competent to stand

1 trial by a doctor, at the time he signed his
2 plea agreement, or after. The doctor he did
3 see, recommended a downward departure, due to
4 defendant's mental condition, at the time of
5 the crime, and at the time of the court
6 proceedings. Defendant's attorney held back
7 the true facts of this agreement from
8 defendant.

9 As Ground Three, petitioner asserts that he "never believed
10 he was giving up his right to appeal". Petitioner contends:

11 When Defendant signed the deal for lower
12 term, defendant was told by court appointed
13 counsel that she would make sure that he
14 would not give up his right to appeal, if he
15 signed the deal. Also the defendant was
16 medicated, when he signed the deal, and
17 trusted his counsel.

18 In his amended Section 2255 motion filed on August 22, 2005,
19 petitioner asserts additional grounds for relief.

20 As Ground Four, petitioner refers to conditional plea
21 agreements in which a defendant may enter a conditional plea of
22 guilty, reserving the right to appeal specified issues.

23 Petitioner asserts:

24 Due to the many conditional plea violations,
25 this defendant is entitled to have his plea
26 withdrawn in the interest of justice, but
would consider to dismiss that thought if I
am given the requested downward departure.

As Ground Five, petitioner asserts that the court did not
follow the "requirement of disclosure in open court" at the time
of the change of plea and that "due to his medicated state, the
defendant was clearly taken advantage of by all parties."

As Ground Six, petitioner contends that he is entitled to
withdraw his guilty plea if he can show a fair and just reason

1 for requesting withdrawal and that petitioner "is positive that
2 he meet [sic] this standard of proof."

3 As Ground Seven, petitioner, referring to Boykin v. Alabama,
4 395 U.S. 238 (1969), holding that a defendant must be apprised of
5 the constitutional rights a defendant is relinquishing by
6 pleading guilty, asserts:

7 The defense [sic] contends that the wording
8 of the plea agreement was manufactured by
9 court appointed counsel in this matter, to
10 get the defendant to sign an agreement
11 opposite of what she presented, and to be rid
12 of a difficult defendant, who was trying to
13 find out all aspects of the investigation by
14 her investigator, who never did any such
15 thing, and trying to find out who was the
16 employee of Twining Laboratories who
17 collected evidence with a bank employee, that
18 may have contaminated major evidence that
19 identify the defendant, that may have been
20 inadmissible.

21 Petitioner was charged with armed bank robbery in violation
22 of 18 U.S.C. § 2113(a). Petitioner pleaded guilty pursuant to a
23 written Plea Agreement. In pertinent part, the Plea Agreement
24 set forth the maximum sentence, fine and term of supervised
25 release that could be imposed on petitioner. The Government
26 agreed to recommend that defendant be sentenced at the low end of
the applicable guideline range and to recommend that defendant
receive a three level reduction in his offense level for
acceptance of responsibility under U.S.S.G. § 3E1.1. The Plea
Agreement specifically provided:

27 The defendant understands that a sentencing
28 guideline range for this case will be
29 determined by the Court pursuant to the
30 Sentencing Reform Act of 1984 (18 U.S.C. §§

3551-3742 and 28 U.S.C. §§ 991-998). The defendant further understands that the Court will impose a sentence within that guideline range, unless the Court finds that there is a basis for departure (either above or below the range) because there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.

The Plea Agreement further provided:

The defendant understands that the law gives him a right to appeal his conviction and sentence. He agrees as part of his plea, however, to give up this right so long as his sentence is consistent with the agreement set forth above.

The defendant also gives up any right he may have to bring a post-conviction attack on his conviction or his sentence. He specifically agrees not to file a motion under 28 U.S.C. § 2255 or § 2241 attacking his conviction or sentence.

The Plea Agreement set forth the factual basis upon which petitioner would plead guilty:

On July 16, 2003, the defendant robbed the Bank of America at 2513 Fresno Street in Fresno, in the State and Eastern District of California. A demand note was presented to the teller that said he would shoot her if she did not give him the money. The teller gave the defendant \$6,039, including a dye pack. When the defendant exited the bank, the dye pack exploded. The defendant dropped the money, demand note and his Visa Gold Check Card. Good quality surveillance photos were obtained which match the defendant, and the defendant's fingerprints were found on the demand note. The teller and another witness also identified defendant's photo from a photo lineup as the robber. The deposits of the bank were FDIC insured at the time of the robbery.

Petitioner signed the following approval at the conclusion of the

1 Plea Agreement:

2 I have read this Plea Agreement and carefully
3 reviewed every part of it with my attorney.
4 I understand it, and I voluntarily agree to
5 it. Further, I have consulted with my
6 attorney and fully understand my rights with
7 respect to the provisions of the Sentencing
8 Guidelines which may apply to my case. No
9 other promises or inducements have been made
10 to me, other than those contained in this
11 Agreement. In addition, no one has
12 threatened or forced me in any way to enter
13 into this Plea Agreement. Finally, I am
14 satisfied with the representation of my
15 attorney in this case.

16 During the change of plea proceedings on June 21, 2004,
17 petitioner was sworn under oath.² After being sworn, petitioner
18 advised the court that he had fully read the Plea Agreement; that
19 he had talked the Plea Agreement over with Ms. Voris; that
20 everything in the Plea Agreement was true; that he was pleading
21 guilty because he was in fact guilty; and that he had not had any
22 drugs, alcoholic beverages, or medication in the past twenty-four
23 hours. Ms. Voris then advised the court that she was satisfied
24 that petitioner was both competent to plead guilty and guilty of
25 the charge to which he was pleading. The court then found
26 petitioner to be competent in this matter. Petitioner then
advised the court that he was satisfied with his attorney. The
court then asked petitioner if he understood that he was entitled
to a jury trial, that at such a jury trial petitioner is presumed
to be innocent and that the government would have to prove

²The court only sets forth those aspects of the change of plea proceedings relevant to the claims made by petitioner in his Section 2255 motion.

1 petitioner guilty beyond a reasonable doubt, the United States
2 would have to call witnesses in his presence and that his
3 attorney could cross-examine those witnesses and object to
4 questions, that nobody could make petitioner take the stand and
5 testify against himself, that petitioner could take the stand and
6 testify on his own behalf, that the United States would have to
7 prove beyond a reasonable doubt that petitioner took money
8 belonging to a bank, that petitioner used force or intimidation
9 in doing so, and that the deposits of the bank were insured by
10 the Federal Deposit Insurance Corporation, and that he
11 understood he was waiving his rights of appeal. Petitioner
12 advised the court that he understood all of these rights and that
13 he wished to waive these rights and plead guilty. The court
14 advised petitioner that the court could sentence petitioner, no
15 matter what anyone else may have told him, to up to 20 years in
16 prison, fine petitioner up to \$250,000, or both the fine and
17 imprisonment, that restitution to the Bank of America must be
18 ordered, that the court could impose up to a three year term of
19 supervised release, that, if petitioner violated any of the terms
20 of supervised release, petitioner could be returned to prison for
21 the period of supervised release actually imposed or two years,
22 whichever is less, and that the court must impose a penalty
23 assessment of \$100. The following colloquy then occurred:

24 THE COURT: ... Do you understand that the
25 Court can sentence you, as I'm about to tell
26 you, no matter what anybody else may have
told you? I can give you up to 20 years in
prison. I can fine you up to \$250,000, or

1 both the fine and imprisonment. I must give
2 you restitution to the Bank of America, 2513
3 Fresno Street, Fresno, California ... as may
4 be ordered by the Court. That I can give you
5 up to three-year term of supervision. And
6 should you violate any of the terms of your
7 supervision you could be returned to prison
8 for the period of supervised release actually
9 imposed by the Court, or two years, whichever
10 is less. And I must give you a penalty
11 assessment of \$100. With all that in mind do
12 you still wish to plead guilty.

13 THE DEFENDANT: Yes. I have a question.

14 THE COURT: Sir.

15 THE DEFENDANT: You said you could sentence me
16 up to 20 years even though I signed a plea
17 agreement?

18 THE COURT: Yes. I'm not bound by that plea
19 agreement. The Court will consider it; and I
20 will listen to arguments from the U.S.
21 Attorney's Office; I will listen to arguments
22 from your attorney; I will listen to comments
23 by yourself; and I will review the Probation
24 Report.

25 THE DEFENDANT: Okay.

26 THE COURT: But I promise you - I don't
promise you anything about what the Court
will do in sentencing other than those things
I explained to you.

THE DEFENDANT: Okay.

THE COURT: With that in mind, do you still
wish to plead guilty?

THE DEFENDANT: Yes.

AUSA Rice then read out the factual basis for the guilty plea.

The court asked petitioner, reminding him that he was under oath,
whether he robbed the bank and whether the facts set forth by
AUSA Rice were true and correct, to which the petitioner

1 responded "yes".

2 Prior to sentencing, Ms. Voris filed objections to the
3 Presentence Report in which she requested a two level downward
4 departure based on petitioner's "diminished capacity at the time
5 of the crime, his ongoing mental illness, and his isolation and
6 denial of treatment during his incarceration at the Fresno County
7 Jail." Ms. Voris repeated the request for a downward departure
8 at sentencing, contending that

9 the two level departure to 63 months is
10 appropriate and acknowledges ... the fact of
11 Mr. White's very serious mental illness and
12 also the factor which was not taken into
13 consideration, which is the fact that in the
14 time of his incarceration, he has been in
15 almost complete isolation. This is also
16 based on the results of his mental illness
17 and he has been in custody since July 25th,
18 2003.

19 THE DEFENDANT: July 23.

20 MS. VORIS: July 23rd, 2003. As far as I
21 know, Your Honor, and I will show that I have
22 the - Mr. White has given me copies of his
23 various grievances and difficulties at the
24 jail as they have come up. He has gone on
25 two hunger strikes. He has called me with
26 significant problems. We've addressed them.
We got him finally his medical. He actually
is receiving his medical for his illness, but
did not for a very long time and without the
intervention of the marshals, probably still
would not. They let him out for about a day
to be in a regular cell block before he could
even unwrap his mattress, they had put him
back in. I would ask the Court to take all
these factors into consideration and give him
two levels off for a resulting sentence of 63
months.

...

THE COURT: Mr. White, is there anything you

1 wish to say in your own behalf, sir?

2 THE DEFENDANT: Yes, I would. I just like to
3 say I regret doing this crime that I did. I
4 have a lot of remorse for it. I wrote you a
5 letter and I let you know that. Even though
6 the case is stated by statute as a crime of
7 violence, I never did any actual violence. I
8 never intended to do any act. And it was -
9 when it got to that point to where I walked
10 up to the counter, it was just completely out
11 of my control. And I wasn't on my medical at
12 the time. And the probation office, she
13 misled me, but I'm basically here to deal
14 with my issue instead of her. And I would
15 appreciate it if you would give me this
downward departure because I never really
been given a chance like this in my life and
I'm 37 years old right now. And if you give
me this six years, five months, whatever it
is, it would basically put me up there in the
years and it would be harder for me to find
work. I have mental issues. I need a place
to stay. Within this time, I think if you
give me the downward departure, I think my
family and my program - the drug program and
everything together will be enough to help me
overcome my adversities and be a productive
citizen.

16 The court denied the requested departure. Petitioner was
17 sentenced to 77 months, which was the low end of the guideline
18 range of 77 to 96 months. No appeal was filed.

19 A. Effect of Waiver in Plea Agreement.

20 As noted, pursuant to the Plea Agreement, petitioner waived
21 his right to collaterally attack his conviction and sentence.

22 The United States argues that this waiver precludes the
23 relief requested by petitioner.

24 However, the Ninth Circuit has recently held that a plea
25 agreement that waives the right to file a federal habeas petition
26 pursuant to 28 U.S.C. § 2254 is unenforceable with respect to a

1 claim of ineffective assistance of counsel that challenges the
2 voluntariness of the waiver. Washington v. Lambert, 422 F.3d 864
3 (9th Cir. 2005). In so holding, the Ninth Circuit cited with
4 approval decisions from other courts holding that, in the context
5 of § 2255 challenges brought by federal prisoners, waivers cannot
6 bar claims of ineffective assistance of counsel associated with
7 the negotiation of plea agreements or the voluntariness of the
8 plea agreement. Consequently, to the extent that petitioner's
9 claims are based on ineffective assistance of counsel in
10 connection with the negotiation of the plea agreement and the
11 entry of the guilty plea pursuant to the plea agreement, the
12 court concludes that such claims are not barred by the terms of
13 the Plea Agreement.

14 There is another reason why the waiver in the Plea Agreement
15 does not bar petitioner's claims. Rule 11(b)(1), Federal Rules
16 of Criminal Procedure, provides in pertinent part:

17 Before the court accepts a plea of guilty
18 ..., the defendant may be placed under oath,
19 and the court must address the defendant
20 personally in open court. During this
21 address, the court must inform the defendant
22 of, and determine that the defendant
23 understands, the following:

24 ...

25 (N) the terms of any plea-agreement
26 provision waiving the right to appeal or to
collaterally attack the sentence.

27 Here, the transcript of the change of plea proceedings
28 establishes that the court asked petitioner if petitioner
29 understood that "you are waiving rights of appeal". However, the

1 court did not ask petitioner if he understood that he was waiving
2 any right he may have to bring a post-conviction attack on his
3 conviction or sentence, including a motion under 28 U.S.C. §
4 2255. Because the failure to question petitioner specifically
5 about the waiver of the right to file a post-conviction motion
6 collaterally attacking his conviction or sentence may constitute
7 plain error, see United States v. Arellano-Gallegos, 387 F.3d 794
8 (9th Cir. 2005), the court concludes that the waiver in the Plea
9 Agreement is unenforceable.

10 Therefore, the court concludes that the waiver of the right
11 to bring a Section 2255 motion set forth in the Plea Agreement
12 does not bar petitioner's claims.

13 1. Ineffective Assistance of Counsel.

14 Claims asserting the ineffective assistance of counsel are
15 analyzed under the two-prong test announced in Strickland v.
16 Washington, 466 U.S. 668 (1984). As explained in United States
17 v. Quintero-Barraza, 78 F.2d 1344, 1348 (9th Cir. 1995), cert.
18 denied, 519 U.S. 848 (1996):

19 According to Strickland, there are two
20 components to an effectiveness inquiry, and
21 the petitioner bears the burden of
22 establishing both ... First, the
23 representation must fall 'below an objective
24 standard of reasonableness.' ... Courts
25 scrutinizing the reasonableness of an
26 attorney's conduct must examine counsel's
'overall performance,' both before and at
trial, and must be highly deferential to the
attorney's judgments ... In fact, there
exists a 'strong presumption that counsel
'rendered adequate assistance and made all
significant decisions in the exercise of
reasonable professional judgment.'" ... In

1 short, defendant must surmount the
2 presumption that, 'under the circumstances,
3 the challenged action "might be considered
4 sound trial strategy."' ... Thus, the proper
5 inquiry is 'whether, in light of all the
6 circumstances, the identified acts or
7 omissions were outside the wide range of
8 professionally competent assistance.'

9 If the petitioner satisfies the first prong,
10 he must then establish that there is 'a
11 reasonable probability that, but for
12 counsel's unprofessional errors, the result
13 would have been different'

14 Where a petitioner enters a guilty plea upon the advice of
15 counsel, the voluntariness of the plea depends upon whether the
16 petitioner received effective assistance of counsel. In order to
17 prevail on an ineffective assistance of counsel claim, "the
18 [petitioner] must show that there is a reasonable probability
19 that, but for counsel's errors, he would not have pleaded guilty
20 and would have insisted on going to trial." Hill v. Lockhart,
21 474 U.S. 52, 56-57 (1985).

22 Here, the transcript of the plea colloquy establishes that
23 petitioner was not misled by Ms. Voris as to the terms of the
24 Plea Agreement as asserted by petitioner. Petitioner stated
25 under oath that he had read the Plea Agreement, that he
26 understood its terms, and that he was satisfied with his
counsel's representation. Although petitioner now claims that
Ms. Voris misled him about his right to appeal and that he never
believed he was waiving his right to appeal, the specific terms
of the Plea Agreement belie that claim as does petitioner's
statement under oath that he understood he was giving up his

1 right to appeal and that he still wished to plead guilty even
2 though he was giving up his right to appeal. Petitioner's claim
3 that he was medicated at the time he changed his plea also is
4 belied by his statement under oath that he had not taken any
5 medication during the twenty-four hours preceding the change of
6 plea. Furthermore, there was nothing in petitioner's demeanor or
7 conduct during the change of plea proceedings which would have
8 caused the court to be concerned about petitioner's competence to
9 enter into the Plea Agreement and to plead guilty pursuant to the
10 terms of the Plea Agreement. Finally, petitioner's motion makes
11 clear that he would not have pleaded guilty and would have
12 insisted on going to trial if petitioner's claims about Ms.
13 Voris' alleged ineffective representation were established. It
14 is apparent from petitioner's motion that he hopes to be able to
15 enter into a conditional guilty plea to preserve his right of
16 appeal but will agree to a non-conditional guilty plea if he is
17 given the two-level downward departure previously requested by
18 Ms. Voris.

19 Therefore, the court concludes that petitioner is not
20 entitled to relief pursuant to Section 2255 to the extent that he
21 alleges that he entered into the Plea Agreement and changed his
22 plea because of the ineffective assistance of counsel.

23 Petitioner also appears to claim that he is entitled to
24 relief on the ground of ineffective assistance of counsel because
25 of Ms. Voris's failure to investigate petitioner's defense.
26 Petitioner contends that Ms. Voris failed to investigate whether

1 an employee of Twining Laboratories who, with a bank employee,
2 picked up a Visa Gold Card with petitioner's picture on it which
3 was outside the bank and gave the credit card to the police when
4 the police arrived was a possible suspect in the bank robbery.

5 Petitioner's claim is without merit. The other physical
6 evidence connecting petitioner to the bank robbery as well as
7 eyewitness identifications of petitioner as the bank robber
8 negate any claim that Ms. Voris was constitutionally ineffective
9 by allegedly failing to investigate whether the Twining
10 Laboratories employee who picked up a credit card with
11 petitioner's picture on it outside the bank was the bank robber.
12 As noted supra, to succeed on a claim of ineffective assistance
13 of counsel, petitioner must demonstrate that Ms. Voris's failure
14 to investigate falls below an "objective standard of
15 reasonableness", Strickland, supra, 466 U.S. at 688, and
16 petitioner must demonstrate a "reasonable probability" that, but
17 for Ms. Voris's failure to investigate whether the Twining
18 Laboratories employee was the bank robber, the result of the
19 criminal proceedings against petitioner would have been
20 different. Strickland, id. at 694. "A reasonable probability is
21 a probability sufficient to undermine confidence in the outcome."
22 Id. Petitioner has made no such showing with regard to this
23 claim.

24 Petitioner also bases his claim of ineffective assistance of
25 counsel on counsel's failure to investigate that the Visa photo
26 gold card with petitioner's picture on it "may have been

1 contaminated" and, therefore, inadmissible.

2 Petitioner has not established ineffective assistance of
3 counsel on this ground. Any defect in the chain of custody goes
4 to the weight, not the admissibility of evidence. See United
5 States v. Matta-Ballesteros, 71 F.3d 754, 769 (9th Cir. 1995),
6 amended, 98 F.3d 1100 (9th Cir. 1996), cert. denied, 519 U.S.
7 1118 (1997). Furthermore, petitioner points to nothing that
8 would cast doubt on the integrity of the chain of custody of the
9 Visa photo gold card making petitioner's allegation of
10 contamination speculative. Therefore, petitioner has failed to
11 demonstrate prejudice and to rebut the strong presumption of
12 attorney competence mandated by Strickland.³

13 2. Competence to Stand Trial.

14 Petitioner also argues that he is entitled to relief
15 pursuant to Section 2255 because he "was not cleared competent to
16 stand trial by a doctor, at the time he signed his plea
17 agreement, or after."

18 The record in this action, specifically a subpoena duces
19 tecum obtained by Ms. Voris and a letter attached to the
20 Presentence Report from Dr. Howard Terrell to Ms. Voris, and a

21 ³In petitioner's reply brief filed on October 21, 2005,
22 petitioner raises claims not previously asserted in his motion.
23 These claims are that counsel was ineffective in failing to
24 challenge the photo spread used by law enforcement for
25 identification of the robber by the eye witnesses to the robbery,
26 failure to challenge the descriptions of the robber given by eye
witnesses, failure to challenge the fingerprint evidence, and
failure to file pretrial motions. Because these claims were raised
for the first time in petitioner's reply brief, the court does not
consider them in resolving petitioner's Section 2255 motion.

1 letter from Dr. Terrell to Ms. Voris attached to petitioner's
2 Section 2255 motion establish that Ms. Voris investigated the
3 issue of petitioner's competence prior to the execution of the
4 Plea Agreement and to the change of plea. Therefore, petitioner
5 received effective assistance of counsel in connection with
6 investigation of petitioner's mental competence.

7 A defendant is entitled to a competence hearing "if there is
8 reasonable cause to believe that the defendant may presently be
9 suffering from a mental disease or defect rendering him mentally
10 incompetent to the extent that he is unable to understand the
11 nature and consequences of the proceedings against him or to
12 assist properly in his defense." 18 U.S.C. § 4241(a). Here, the
13 record described above establishes that Dr. Terrell conducted a
14 forensic psychiatric evaluation of petitioner at the Fresno
15 County Jail on December 13, 2005. In Dr. Terrell's report to Ms.
16 Voris dated December 24, 2003, a copy of which was provided to
17 the Probation Office and to the court at sentencing. In the
18 December 24, 2003 report, Dr. Terrell states that petitioner
19 advised him that he has a long history of mental illness and has
20 been diagnosed with "organic delusional disorder", that he has
21 been prescribed with antipsychotic, antidepressant, and
22 antiseizure medications since the early 1990s, that he has been
23 receiving medication at the Fresno County Jail, that he began
24 experiencing auditory hallucinations in 1989, that, on the date
25 of the bank robbery, petitioner had been without his psychotropic
26 medications for a matter of months; that the voices were

1 bothering him and told him to go into the bank and see if he
2 could get another account; that, due to the voices, he went into
3 the bank and asked the teller how much it would cost to activate
4 an account; that he then saw a lot of money in the bank but that
5 he was not sure how much of the money was real as opposed to a
6 visual hallucination; that he was amazed at the amount of money
7 he saw and wrote a note to the teller telling her to give him the
8 money or he would hurt her; and that he was not under the
9 influence of drugs or alcohol at the time of the bank robbery.

10 Dr. Terrell's December 24, 2003 report further states:

11 **COURT:**

12 When asked the charges against him, he told
13 me he was charged with bank robbery.

14 When asked is this was a felony or
15 misdemeanor, he stated it was a felony.

16 When asked which is more serious, a felony or
17 misdemeanor, he stated that a felony was more
18 serious than a misdemeanor.

19 When asked what would happen if he is found
20 guilty of the current charges, he stated he
21 would receive about 12-15 years in federal
22 prison, however, he was not exactly sure how
23 long he would get.

24 When asked what would happen if a person is
25 found innocent, he stated they would let him
26 go. The defendant told me that if he is
released, he would seek psychiatric
treatment.

When asked what would happen if he is found
not guilty by reason of insanity, he told me
'I'd go to a hospital.'

COURT OFFICIALS:

When asked to name the officials in a court

1 of law, he named the attorney, judge,
2 prosecutor, and the police.

3 When asked the function of his attorney, he
4 replied, *'To make sure that I get a good
5 defense.'*

6 When asked the function of the judge, he
7 replied, *'To sentence me.'*

8 When asked the function of the police in the
9 courtroom, he replied, *'To make sure the
10 prosecutor puts me in prison.'*

11 I asked if he knew the function of the court
12 reporter. He replied, *'The people that type.
13 She's typin' everything that's said in
14 court.'*

15 When asked the function of the court room
16 bailiff or marshals, he replied, *'Security.'*

17 Dr. Terrell's report states that petitioner told him that he
18 started snorting cocaine in 1982 and then progressed to smoking
19 crack cocaine; that he typically smokes two hits of crack cocaine
20 per day; that he had been drug free for two to three months
21 before the bank robbery; that he began smoking marijuana at the
22 age of six; that he last used marijuana about three months before
23 his arrest; that he typically consumed one joint of marijuana per
24 day; that his alcohol consumption was approximately 40 ounces of
25 malt liquor per day. Dr. Terrell's December 24, 2003 report
26 further states in pertinent part:

MENTAL STATUS EXAMINATION:

Appearance and behavior: The subject is a
well-developed, African-American male ... He
was friendly and cooperative throughout the
interview. There was no evidence of thought
blocking or tics. Eye contact was fair.

1 **Orientation and perception:** He was alert and
2 properly oriented to person, place and time.
3 IQ appeared to be within the average to low-
4 average range.

5 **Thought content and processes:** Associations
6 were tight, coherent and relevant. There was
7 no evidence of hallucinations or delusions.
8 He denied any hallucinations on the date of
9 interview but told me he last heard voices
10 the day before this interview. When asked
11 what the voices said, he told me, '*They say*
12 *all kinda things! You're gonna be old when*
13 *you get out! Your [sic] nothing!'*

14 **Reality Contact:** Good.

15 **Long and short-term memory:** Fair to good.

16 **Recall:** Excellent (able to recall 5 out of 5 items
17 within 5 minutes).

18 **Interpretation of abstract thinking:** Excellent.

19 **Simple math:** Fair to good.

20 **Serial 7s:** Poor.

21 **General Information:** Fair to good.

22 **Judgment:** Fair.

23 **Insight:** Fair.

24 The subject denied any suicidal or
25 homicidal ideation or intent.

26 **Affect and mood:** Mood was euthymic
[tranquil]. Affect was blunted but otherwise
consistent with mood.

...

DIAGNOSTIC IMPRESSION:

Psychotic Disorder NOS (most likely due to
severe head trauma in a motor vehicle
accident of 1986).

**History of Seizure Disorder subsequent to
head trauma in motor vehicle accident in**

1 **1986.**

2 **Cocaine abuse.**

3 **Cannibis abuse.**

4 **Personality Disorder NOS** (with antisocial
5 features).

6 (Rule out Antisocial Personalilty Disorder).

7 ...

8 **COMMENT:**

9 Danny White has a reported history of severe
10 head injuries with seizure disorder and
11 subsequent development of auditory and visual
12 hallucinations. At this point in time, I
13 have nothing to substantiate these claims
14 other than Mr. White's word. I believe it
15 would be helpful if counsel could obtain his
16 prior psychiatric records from Vacaville
17 State Prison, the Fresno County Jail and any
18 other facilities that might have such
19 records.

20 With regards to the possibility of qualifying
21 for a downward departure, it should be noted
22 that individuals who suffer from psychotic
23 mental disorders (where they have long
24 episodes of losing contact with reality)
25 often will have difficulty in making sound
26 judgment and also will have difficulty with
impulse control. In addition, individuals
who have seizure disorder and individuals
with psychotic mental disorder, often have
grave difficulty maintaining gainful
employment and have great difficulty
supporting themselves financially by gainful
employment. It is my understanding that a
severe need for money was a factor in the
crime. Mr. White's need for money was likely
based in large part upon his reported history
of epilepsy and psychotic mental disorder
that developed after his severe head injuries
in 1986. As a result, I believe Mr. White
should be considered by the Court for a
downward departure due to his reported
history of epilepsy and chronic psychotic
mental illness. I would recommend, however,

1 that additional records be
2 obtained/subpoenaed by counsel because at
3 this point in time, I have nothing to support
4 Mr. White's claims of epilepsy and chronic
5 psychotic mental disorder other than his
6 statements to me on December 13, 2003.

7 As noted, on January 8, 2004, Ms. Voris subpoenaed the Custodian
8 of Records for the California Department of Corrections for
9 production of "any and all parole records and records relating to
10 [petitioner's] incarceration with the California Department of
11 Corrections, specifically including records relating to any and
12 all medical and/or psychological/psychiatric care, diagnosis,
13 treatment and/or prognosis during the time he was incarcerated
14 and/or while he was on parole" These records were produced
15 and provided to Dr. Terrell. In a Supplemental Report to Ms.
16 Voris dated January 29, 2004, Dr. Terrell describes the
17 antipsychotic, antidepressant and antiseizure medications
18 prescribed to petitioner during 2003 and comments:

19 The medical documents recently provided
20 indicate that the subject has been receiving
21 an **antipsychotic**, an **antidepressant** and an
22 **antiseizure medication** at the Fresno County
23 Jail. This would be consistent with the
24 history he gave me of suffering from
25 recurrent seizures and mental disorder.

26 These reports do not establish "reasonable cause to believe
27 that the defendant may presently be suffering from a mental
28 disease or defect rendering him mentally incompetent to the
29 extent that he is unable to understand the nature and
30 consequences of the proceedings against him or to assist properly
31 in his defense." Although Dr. Terrell's December 24, 2003 report

1 describes petitioner's history of seizures and mental illness,
2 Dr. Terrell's report also states that petitioner understood the
3 nature of the charges and the criminal proceedings against him,
4 that petitioner was alert, properly oriented, and that his
5 associations were "tight, coherent and relevant". Petitioner
6 advised Dr. Terrell that he currently was taking his medications.
7 It is apparent that Ms. Voris, relying on Dr. Terrell's reports
8 believed that evidence of petitioner's mental condition did not
9 prevent him from being competent to stand trial or to plead
10 guilty but, rather, was evidence which could be presented to the
11 court for consideration at sentencing. As noted, Ms. Voris
12 stated during the change of plea proceedings that she believed
13 petitioner to be competent. Petitioner's conduct in the
14 courtroom during pretrial proceedings, the entry of the guilty
15 plea and sentencing did not raise any concern to the court that
16 petitioner's competence to stand trial or to enter a guilty plea
17 was at issue.

18 Therefore, the court concludes that petitioner has not
19 demonstrated that he was denied the effective assistance of
20 counsel because of counsel's failure to move for a competency
21 hearing pursuant to Section 4241(a) or that petitioner was
22 deprived of due process because of the court's failure to order a
23 competency hearing sua sponte.

24 Therefore, petitioner is not entitled to relief on this
25 ground.

26 3. Failure of Court to Follow Requirement of

1 Disclosure in Open Court.

2 Petitioner contends that he is entitled to relief because
3 "at the time the plea was offered, the court did not follow the
4 requirement of disclosure in open court". Petitioner does not
5 further describe the basis for this contention.

6 The court assumes that petitioner is attempting to assert
7 that the court failed to comply with the requirements of Rule 11,
8 Federal Rules of Civil Procedure. As discussed supra, the court
9 did neglect to specifically advise petitioner that he was waiving
10 his right to collaterally attack his conviction and sentence.
11 However, because the court has considered all of the claims
12 properly raised to this court in petitioner's Section 2255
13 motion, the court concludes that this error has been rectified.

14 As explained in United States v. Grewal, 825 F.2d 220, 222
15 (9th Cir. 1987):

16 For a section 2255 movant to successfully
17 challenge a guilty plea based upon a
18 violation of Rule 11, he must establish that
19 the violation amounted to a jurisdictional or
20 constitutional error or that the violation
21 resulted in a complete miscarriage of justice
22 or in a proceeding inconsistent with the
demands of fair procedure ... He must also
establish that he was prejudiced in that he
was unaware of the consequences of his plea,
and, if properly advised, would not have
pleaded guilty.

23 Because petitioner does not elaborate on his claim that "the
24 court did not follow the requirement of disclosure in open
25 court", petitioner has not made the showing required by Grewal.
26 Therefore, petitioner is not entitled to relief on this ground.

1 Petitioner's suggestion in Ground Seven that the court
2 failed to advise petitioner of the constitutional rights he was
3 relinquishing by pleading guilty is belied by the plea colloquy
4 set forth above as well as by the terms of the Plea Agreement,
5 terms which petitioner stated under oath he had read and
6 understood. Therefore, petitioner is not entitled to relief on
7 this ground.

8 ACCORDINGLY:

9 1. Petitioner's motion to recall his motion to withdraw the
10 Section 2255 motion is granted.

11 2. Petitioner's motion to vacate, set aside or correct
12 sentence pursuant to 28 U.S.C. § 2255 is denied.

13 3. The Clerk of the Court is directed to enter judgment for
14 respondent.

15 IT IS SO ORDERED.

16 **Dated: November 21, 2005**
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE